

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
U.S. MAGISTRATE JUDGE
EL PASO DIVISION

UNITED STATES OF AMERICA) No. EP:17-MJ-4409(1)-MAT
vs.) EP:17-MJ-4456(1)-MAT
ELBA LUZ DOMINGUEZ-PORTILLO) EP:17-MJ-4461(1)-MAT
MAYNOR ALONSO CLAUDINO LOPEZ)
JOSE FRANCIS YANES-MANCIA) EP:17-MJ-4462(1)-MAT
NATIVIDAD ZAVALA-ZAVALA)
BLANCA NIEVE VASQUEZ-HERNANDEZ) EP:17-MJ-4499(1)-MAT

El Paso, Texas

November 1, 2017

STATUS CONFERENCE

Before the Honorable Miguel A. Torres

A P P E A R A N C E S:

FOR THE GOVERNMENT:

MS. LAURA FRANCO GREGORY
MR. DOUGLAS RENNIE

Assistant United States Attorney
700 E. San Antonio
El Paso, Texas 79901

FOR DEFENDANT:
MR. SERGIO GARCIA

700 E. San Antonio, Suite D-401
El Paso, Texas 79901

Proceedings reported by stenotype. Transcript produced by
computer-aided transcription.

1 THE COURT: Let me call the following cases. Marshals
2 you don't have to bring the Defendants up. EP:17-M-4409, the
3 United States of America versus Elba Luz Dominguez-Portillo;
4 EP:17-M-4456, the United States of America versus
5 Maynor Alonso Claudino Lopez; EP:17-M-4461, the United States
6 of America versus Jose Francis Yanes-Mancia; EP:17-M-4462, the
7 United States of America versus Natividad Zavala-Zavala; and
8 EP:17-M-4499, the United States of America versus
9 Blanca Nieve Vasquez-Hernandez.

10 We are here for a status conference I had set. Let me get
11 announcements, please.

12 MS. GREGORY: Good afternoon, Your Honor,
13 Laura Franco Gregory and Douglas Rennie for the United States.

14 THE COURT: Good afternoon.

15 MR. GARCIA: Good afternoon, Judge, Sergio Garcia on
16 behalf of all of the Defendants.

17 THE COURT: Well, let me -- I know this is kind of a
18 slightly unusual proceeding. Let me just let the parties know
19 what is on my mind in these cases. We have had in the last
20 number of months a number of voluminous 1325 prosecutions or a
21 number of cases involving Central American defendants who are
22 accompanied by minor children or minor siblings at the time
23 that they were coming up. At least that was the representation
24 that was made to me. Most of the time I have found out about
25 this during the plea and sentencing hearings in these cases.

1 As you are all aware, we set them for one hearing, and it
2 is either a plea or we will set it for trial at some point
3 after that. At that time, it happened with some frequency in
4 the last few months that the individuals indicate they were
5 accompanied by a minor, they don't know where they are, they
6 have not been made aware of the whereabouts or the well being,
7 and some cases also I will say, and this is all part of the
8 public record where they indicated they were not provided
9 information at the time of their arrest and separation from the
10 minor child.

11 So, I have been troubled by these reports that I am getting
12 from these defendants, and I have asked the CJA counsel that I
13 have appointed in these cases to just assist their clients in
14 trying to get some information from their clients from --
15 sorry, from the Government with regard to -- I have asked CJA
16 to, frankly, take advantage of the fact they have a lawyer that
17 can make phone calls and ask questions for them just to find
18 out. I would imagine that, and I am always struck when this
19 happens by how anxiety provoking I think it is for these
20 parents who make the representation that this is their child or
21 their sibling in some cases. So I have taken advantage of the
22 fact they have an appointed lawyer to try to track some of this
23 information down, and some of the reports I get back is the
24 information is very tricky to track down.

25 So the Court has done its own research to look into this

1 situation and some of the legal issues involved, and it is
2 something that is very -- it is a complex issue. There are --
3 it involves laws and agencies that really I had not been
4 familiar with before this issue. I think last week really what
5 I thought was when I did some of these cases I really -- I just
6 need to have better information as to -- I need to have better
7 information as to what the applicable laws are in these cases
8 and really how they can be an issue in this Court in terms of
9 the rearraignments, okay?

10 Candidly, and I am telling both parties my concern is with
11 issues impacting the voluntariness of the plea because it
12 involves a situation where at least for the Defendants where
13 they were arrested by the Government that the Government at
14 that time obviously they are not going to place the children in
15 custody with them, and they take them to residential centers
16 that are required by law to meet certain requirements of basic
17 -- at least basic -- what is the word? I can't think of the
18 right phrase, but that meet certain basic requirements in terms
19 of their care and their well being. So, what I am concerned
20 about is really just what appears to be the total lack of
21 information that these Defendants appear to be getting.

22 Now, I am not suggesting that this is decisions made by
23 individual agents or by an individual Border Patrol sector here
24 or anything like that or by the Office of Refugee Resettlement,
25 but the bottom line is they are not getting the information,

1 and I am a little bit troubled that by the time of their pleas
2 they don't have this information, and I certainly had
3 communicated in the past sometimes with defendants who say that
4 their whole goal is to reunite with their kids or find
5 something out about their kids. It is an anxiety that looms
6 large. I don't think there is a lot of reason to doubt the
7 sincerity of those expressions in most cases.

8 Here is what I would like to do. I am going to ask the
9 parties -- I am going to issue a specific, and it is not going
10 to be a long order, asking the parties to brief some issues
11 that hopefully can answer some of these questions. I am going
12 to reset this case for a status conference for next week.
13 Thursday is what I am thinking. I will talk to the parties
14 about that in a second to see what their availability is, but
15 basically, at that point, we can see where we are whether there
16 is a plea at that time or a request for trial or whatever.

17 I just would like to get the parties positions, and this is
18 why we have -- I have taken the individual step of appointing
19 the Office of the Federal Public Defenders in this case. They
20 are not subject to even some of the limitations that we have
21 with a CJA panel and even in terms of what is authorized
22 specifically in terms of how many hours they can bill, et
23 cetera. I thought I am not going to get into that jam. I am
24 going to ask the Public Defender to do this. I appreciate the
25 Office of the Federal Public Defender assisting us in these

1 cases under these unusual circumstances.

2 Here is what I am getting to in terms of the issues. I
3 will flush these out a little more and try to finesse them in
4 the order I will put out hopefully by this afternoon or
5 tomorrow morning at the latest. It is essentially this.

6 The first question is really what are the Government's
7 procedures for providing information to petty misdemeanor
8 defendants at the time of their arrest providing information
9 regarding the well being and the whereabouts of their child?

10 Now, are there statutory -- I don't know what the process
11 is. I never heard what the process is exactly. Are there
12 statutory or regulatory procedures that spell out a certain
13 protocol that should be followed with regard to the parents or
14 is there something under the [inaudible] settlement which I am
15 sure the parties may be familiar with with regard to these
16 unaccompanied minor cases? The [inaudible] settlement spells
17 out many of the requirements for the Office of Refugee
18 Resettlement in handling unaccompanied child issues in lieu of
19 regulations that have not been promulgated.

20 Basically, is there any authority for what information the
21 parents are provided, and my look at this is looking at it
22 really from the side of the parents or the defendants in my
23 Court or who have been in my Court and/or who have active
24 matters in the Court. That's the first issue.

25 The second issue is does a defendant charged with a petty

1 misdemeanor have any parental rights regarding their children
2 -- sorry, does a defendant charged with a petty misdemeanor
3 immigration offense where they are undocumented, do they have
4 parental rights? There is just our research, and in my Court
5 here the right to familial association I think the case is
6 Troxler that talks about that under the 14th Amendment. So,
7 does that -- it has been applied in a number of different
8 contexts and is recognized as a fundamental right. Does that
9 somehow apply to an undocumented alien 1325 defendant basically
10 is what I am trying to get to. It is what I would like to find
11 out.

12 If so, then the next question would be just assuming that
13 right does exist, is any denial of that right, does it raise
14 any issues akin to what was raised in Kentucky versus Padilla
15 which is this kind of collateral consequence type issue that
16 would have a bearing on the guilty plea.

17 That leads me to my final issue, which is the most
18 important issue, but kind of by necessity it goes at the very
19 end here is do I even have authority to hear any of this?
20 This is coming up to me. My concerns come up within the
21 context of the Rule 11 guilty plea and the colloquy I have to
22 go through. I think it is Rule 11(b)(2) that talks about the
23 voluntariness of a plea where we follow certain questions and
24 make sure the plea is purely voluntary and specifically
25 somebody is pleading guilty because they are guilty and for no

1 other reason. So, my concerns have arisen within that.

2 It is not just -- basically, that's my feeling has been
3 that these issues that I am raising kind of falls within my
4 wheelhouse here because they do come up in Rule 11 pleas. At
5 least that's kind of my view. I could be wrong about that. I
6 don't know. I am asking you all to give me your position on
7 that.

8 I know I am asking a lot. These are just questions that
9 are coming up a lot. I'm really concerned about the issue, and
10 so I hope that these are issues that you will be able to
11 address. I'll spell them out a little more specifically. I
12 wanted to give you an idea of why are we having this hearing
13 and what is really concerning the Court. That's pretty much
14 it. So, I would like the parties to address that if I could.

15 If we reset this for Thursday, I might ask you all to get
16 me something by Wednesday, Wednesday of next week. Look, this
17 doesn't have to be some [inaudible] monster brief. Address it.
18 If you give me the top -- if there are cases that apply that
19 two or three cases that are critical on a particular issue,
20 that's it. I don't want you to feel like I just dropped this
21 basically an appellate brief on you or something by next
22 Wednesday. I would like to get them addressed, and if there
23 are any other issues we need to take up, I would ask you to let
24 me know.

25 Is there anything else the parties want to bring up at this

1 time? I will start with the Government.

2 MS. GREGORY: No, Your Honor. We will receive the
3 order --

4 THE COURT: Yes. It is really these four issues. We
5 are -- I didn't want to come out here essentially empty handed
6 and say I have concerns, wait for my order and we will see you
7 next week. We will spell those out and have something out,
8 looking at the time, it will probably be first thing tomorrow
9 morning you will have something.

10 Mr. Garcia, anything you wanted to raise, sir?

11 MR. GARCIA: Yes, sir, actually I do.

12 Last week I was appointed to this case. My boss called me
13 to her office, and she said I want you to tackle that issue.

14 THE COURT: Okay.

15 MR. GARCIA: I went and I did research.

16 THE COURT: Okay.

17 MR. GARCIA: As you know, these cases basically have
18 the same issue. They are all 1325s and all misdemeanor cases,
19 and I am ready to file a motion. In fact, I will wait for your
20 order, but I was ready to file it by this Friday. But because
21 all these Defendants are similarly situated and taking into
22 account notions of judicial economy, I was going to ask
23 permission from the Court to see if solely for purposes of this
24 motion or the brief that we file if I could solely for that,
25 for that pretrial motion, could I consolidate the Defendants so

1 I file one motion instead of five repetitive motions, one for
2 each one?

3 THE COURT: Or one brief instead of --

4 MR. GARCIA: One brief.

5 THE COURT: I doubt the Government would have an issue
6 with that. I will let you file a motion, and we'll see what
7 the Government responds to it. It sounds like a kind of more
8 efficient way to approach.

9 MS. GREGORY: The Government has no objection to that.
10 However, the only concern is the Government is hearing about
11 these issues today. It appears Defense counsel had notice of
12 this before today's hearing. The Government would ask for the
13 seven days plus it appears you might perhaps raise other issues
14 in your motion pertaining to these particular Defendants. That
15 might cause the Government to need additional time to respond.

16 MR. GARCIA: Just for the record, the only thing I
17 knew is there were five misdemeanors and there were five
18 Defendants, and the reason I know this is because I have a
19 friend who clerks in the Ninth Circuit. He informed me they
20 were similar. Nobody gave me extra info. It is how I know,
21 and it is why I went with the research.

22 I am not opposing the seven day time limit that Judge might
23 give us. I will wait until --

24 MS. GREGORY: I suppose the Government will have to
25 wait for the Defendants brief if it will include facts

1 pertinent to each of these particular Defendants.

2 THE COURT: I see what you are saying.

3 MS. GREGORY: I don't know what you're going to file.
4 As a result of it, we would need to respond to whatever motion
5 you anticipate on filing.

6 THE COURT: Sure. Let me think about this for one
7 second. I do want to put this on the record, again, because
8 this is a different proceeding than the way we ordinarily
9 handle these 1325s.

10 I reached out to each party individually just to inform
11 them of what the issue was related to these unaccompanied
12 minors. As to each, there was no discussion of individual
13 cases.

14 MS. GREGORY: The Government does not make that --

15 THE COURT: Or anything like that. I wanted to be
16 clear about that. I didn't want to give, and I reached out to
17 the United States Attorney's Office, and I reached out to your
18 office just to say it is related to this issue, there may be
19 some briefing involved, and that pretty much concluded that.

20 Now, let's think about this issue for a second. These are
21 basically -- you raised a really good point. I don't want to
22 put you in a disadvantage where he will talk about the facts
23 specific to each individual case and you have to respond to
24 that because it is specific to particular cases. If that were
25 the case, it would be a more traditional situation where you

1 file a motion and the Government responds to the motion. I
2 need to think about this for a moment.

3 Basically, I really want to focus on the legal issues
4 because I will say this, and just bear with me for a moment,
5 Mr. Garcia.

6 MR. GARCIA: Sure.

7 THE COURT: What I did, and the reason I know these
8 Defendants were accompanied by a minor was during the initials
9 when I was on duty last week one of my last questions was are
10 any of you accompanied by a minor child or -- I, at that point,
11 took information and just asked I believe in all of the cases
12 just I think I asked them and I said discuss it with your
13 attorney. That's when I made the decision to appoint the
14 Federal Defenders on the case.

15 In terms of -- I mean, the similarity in each of the facts
16 is that they each represented to me at the initial that yes, I
17 was accompanied by a minor. I think I asked in all of the
18 cases don't tell me anything except the age and gender of the
19 minor that accompanied you and whether it was a son or daughter
20 or something like that. We have those basic facts which, quite
21 frankly, is pretty much enough for you all to proceed with
22 these issues. I don't know that it needs to be a kind of
23 motion and response type situation.

24 MR. GARCIA: Judge, if I may? What I was suggesting,
25 is no. The facts are pretty straightforward, and the facts are

1 not really what impacts the case. It is the law that you just
2 mentioned that has the impact on the cases, the issues that you
3 just talked about. Those are the issues that I was thinking.
4 A more efficient way for me to address those issues is wait for
5 your order and address precisely those issues in a motion,
6 consolidated motion, and basically a motion to dismiss, but it
7 would be incorporating everything you just talked about because
8 everything you just talked about is relevant to the disposition
9 of this case.

10 THE COURT: I see what you are saying. So, now it
11 gets us to what you are talking about. Well, I think what we
12 could do then is in anticipation of a motion, this will
13 protract the matter somewhat. Obviously, I am sure you are
14 aware of that, and I imagine you discussed that with your
15 clients.

16 MR. GARCIA: Yes. It is how I found out about the
17 specific situation. When I was appointed, I quickly went to
18 see them and it is how I --

19 THE COURT: Sure. Look, we want to do this right, and
20 if we give you some time to file your motion, and give you some
21 time to respond to it, nobody is really behind the eight ball
22 and can address the issues with sufficient time.

23 What do you anticipate in terms of addressing these issues
24 then? You indicated your intention is to file a motion that
25 these are dismissed and want the Government to respond? When

1 would you anticipate filing that?

2 MR. GARCIA: Well, I am ready to file it Friday, but
3 if we could wait for your order, then I will make sure, and I
4 think I will incorporate every matter you talked about. I can
5 file it next week like you suggested, seven days, and give the
6 Government an opportunity to respond. I will tell you it is a
7 very complex issue.

8 THE COURT: I know it is.

9 MR. GARCIA: And that it implicates constitutional
10 amendments.

11 THE COURT: Well, if we -- what do you think,
12 Ms. Gregory?

13 MS. GREGORY: We are in an awkward possession. We are
14 waiting for the Court's order to brief certain issues, but
15 Defense counsel is going to file a motion to dismiss in
16 response to the Court's inquiry on briefing issues.

17 What I would ask then if it appears that it is not merely a
18 brief to the Court, it is going to now turn into a motion to
19 dismiss which the Government would ask for under the local
20 rules the amount of time to respond.

21 THE COURT: Whatever standard time you're entitled to,
22 no problem. I mean -- I think that's what we will do. That's
23 what would be fair. My goal was just to get some answers on
24 law, but it is becoming an issue where I actually need -- where
25 it is going to be more than briefing. If it will be motion, we

1 will follow whatever standard deadlines.

2 I will ask you because you indicated you were close to
3 filing something anyway. I would say how about to not put it
4 out too long, maybe Tuesday of next week?

5 MR. GARCIA: You got it.

6 THE COURT: If we do Tuesday, and you will have your
7 time to respond after that, and then we will take up --

8 MR. GARCIA: Just to make sure I cover everything
9 which I think I already did. If you can still produce your
10 order, Judge, giving us the points you want us to cover?

11 THE COURT: Sure.

12 MR. GARCIA: Then I will double check. I am pretty
13 sure I will cover that.

14 THE COURT: I am sure you will make some reference in
15 your motion incorporating this request, and we will handle it
16 like that.

17 MR. GARCIA: Yes.

18 THE COURT: Is there anything else you wanted to bring
19 up right now, anything?

20 MR. GARCIA: No, Judge, thank you.

21 THE COURT: I appreciate it. I know it is a lot I am
22 asking both sides to do, but it is really an issue very
23 important.

24 MS. GREGORY: Fascinating.

25 THE COURT: It is an interesting legal issue, and it

1 is complicated. It deals with statutes and other things.

2 I will tell you, again, keep in mind the last issue I
3 brought up, which is kind of the main issue, is this something
4 that I can even consider? The only way that whole issue in my
5 view can make its way into what we do in these misdemeanor
6 cases or under Rule 11 and under the findings of fact I need to
7 make for a Rule 11 colloquy so ultimately that is the
8 fundamental kind of issue. Is it something I should even be
9 considering? If I have no authority, I have no authority and
10 that's that. If I do, we will take it up at that point.
11 That's really a central issue.

12 MR. GARCIA: Thanks, Judge.

13 THE COURT: I appreciate everybody's patience. I
14 really, really apologize about the mix up with regard to we do
15 some different things on the notice, and we had originally the
16 original lawyers appointed, and then we appointed the
17 Federal Defenders. I thought it would take care of some of
18 these issues. I know it triggers with you all discovery issues
19 and everything else right away so I really do apologize.
20 That's on me.

21 Very well, thank you, we are in recess.

22 MR. GARCIA: Thank you, Judge.

23

24

* * * * *

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATION

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Date: January 17, 2018

/s/ Walter A. Chiriboga, Jr.

Walter A. Chiriboga, Jr.